

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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CAPITOL RECORDS, LLC, *et al.*,

Plaintiffs,

v.

VIMEO, LLC d/b/a VIMEO.COM, *et al.*,

Defendants.

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CASE NO. 09 CV 10101 (RA)

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EMI BLACKWOOD MUSIC, INC., *et al.*,

Plaintiffs,

v.

VIMEO, LLC d/b/a VIMEO.COM, *et al.*,

Defendants.

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CASE NO. 09 CV 10105 (RA)

**DECLARATION OF**  
**MICHAEL A. CHEAH**

I, Michael A. Cheah, declare as follows:

1. I am Senior Litigation Counsel for IAC/InterActiveCorp (“IAC”) and General Counsel of its subsidiary, Vimeo, LLC.<sup>1</sup> I have been employed as an in-house attorney for IAC since June 2006 and have been General Counsel of Vimeo since December 2009. As General Counsel of Vimeo, my responsibilities include oversight and implementation of Vimeo’s copyright policies and compliance with the online safe-harbor provisions of the Digital Millennium Copyright Act, 17 U.S.C. § 512(c) (“DMCA”). In the course of my duties, I have become familiar with Vimeo’s past and current products and services, DMCA policies, and processing of DMCA takedown notices. I submit this declaration in support of Defendants’

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<sup>1</sup> For simplicity, for the remainder of this Declaration, I refer to both the Vimeo, LLC business entity (and predecessors) and the Vimeo service (available through <http://vimeo.com>) as “Vimeo” unless otherwise noted.

Motion for Summary Judgment. Except as otherwise indicated, I have personal knowledge of the facts set forth herein and, if called as a witness, I could and would testify competently to them.

**Vimeo's Policy Regarding Copyright Infringement**

2. It is, and has always been, Vimeo's policy that users may not upload videos that they do not have the legal right to upload or which infringe another's rights, including copyrights. Vimeo makes users aware of this policy in a number of ways, including: (1) its Terms of Service; (2) its Community Guidelines; (3) the summary of rules it provides before a user can upload a video to Vimeo; and (4) its Copyright page.

3. *Terms of Service.* Vimeo's "Terms of Service" (publicly available at <http://vimeo.com/terms>) is the agreement between Vimeo and its users. The Terms of Service state in relevant part:

- a. users may not upload content that infringes any "copyright or other proprietary rights of any party";
- b. by uploading a video, each user represents and warrants that "you own or have the necessary licenses, rights, consents and permissions to use and authorize VIMEO to use all patent, trademark, trade secret, copyright or other proprietary rights in and to your video or Submission to enable inclusion and use of the video or Submission in the manner contemplated by this" Terms of Service;
- c. "VIMEO may, in appropriate circumstances and at its discretion, terminate the accounts of users who infringe the intellectual property rights of others"; and
- d. "VIMEO does not and cannot review all videos or Submissions posted to or created by users accessing the Services (including, but not limited to, the Vimeo Site), and is not in any manner responsible for the content of these videos, communications, comments or Forum postings, or the activities of Vimeo.com users. You acknowledge that by providing you with the ability to view and distribute user-generated-content through the Services (including, but not limited to, the Vimeo Site), VIMEO is merely acting as a passive conduit for the

distribution of such information, and is not undertaking any obligation or liability relating to the content or the users' activities. Accordingly, VIMEO does not guarantee the accuracy, integrity, completeness, non-infringement or quality of such content."

Attached hereto as **Exhibit 1** is a true and correct copy of Vimeo's Terms of Service.

4. In order to create a Vimeo account, each user must accept Vimeo's Terms of Service.

5. Vimeo makes the Terms of Service available: (1) through a clickable link (called "Terms") in the footer of the Vimeo website; (2) on its "Help" page (publicly available at <http://vimeo.com/help>); and (3) on its "FAQ" page (publicly available at <http://vimeo.com/help/faq>). In addition, when a user registers for a Vimeo account, he or she must confirm that he or she accepts the Terms of Service.

6. **Community Guidelines.** Vimeo has established "Community Guidelines" (publicly available at <http://vimeo.com/guidelines>), which provide further information on what users may and may not upload. The Community Guidelines are incorporated by reference into Vimeo's Terms of Service. The Community Guidelines state in relevant part:

**1. I will upload only videos I created myself.**

- You must own or hold all necessary rights (copyrights, etc.) to your video.

Attached hereto as **Exhibit 2** is a true and correct copy of Vimeo's Community Guidelines.

7. Vimeo makes the Community Guidelines available through the Terms of Service, Help page, FAQ page, and Upload Page (described below).

8. **Upload Page.** Registered users who wish to upload a video through the Vimeo website are directed to the "Upload Page" (publicly available to registered users at <http://vimeo.com/upload>). The Upload Page states in relevant part:

Please follow these rules:

1. I will upload videos I created myself. [+ More](#)
2. I will not upload videos intended for commercial use. [See commercial options.](#) [+ More](#)
3. I understand that certain types of content are not permitted on Vimeo. [+ More](#)

Still have questions? Read the full [uploading guidelines](#).

Clicking on the “uploading guidelines” link brings the user to the Community Guidelines.

9. Clicking the “+ More” link adjacent to the first rule will cause the following text to be displayed:

- You must own or hold all necessary rights (copyrights, etc.) to your video.
- “I have permission” does not mean you created it.
- Directors, DPs, editors, musicians, graphic effects artists, and actors may upload works to which they have contributed significantly.
- Public domain videos are not allowed.
- Please add your role/involvement in the video description to avoid accidental deletion.

Attached hereto as **Exhibit 3** is a true and correct copy of Vimeo’s Upload Page.

10. **Copyright Page.** Vimeo has a webpage dedicated to its copyright policy, titled “Vimeo.com DMCA (Copyright) Notifications and Counter-Notifications Process” (publicly available at <http://vimeo.com/dmca>) which is incorporated into its Terms of Service. This

Copyright Page states:

VIMEO respects the intellectual property of others, and we ask our users to do the same. Each user is responsible for ensuring that the materials they upload to the Vimeo Site do not infringe any third party copyright.

VIMEO will promptly remove materials from the Vimeo Site in accordance with the Digital Millennium Copyright Act (“DMCA”) if properly notified that the

materials infringe a third party's copyright. In addition, VIMEO may, in appropriate circumstances, terminate the accounts of repeat infringers.

### **Filing a DMCA Notice to Remove Copyrighted Content-for Copyright Holders**

If you believe that your work has been copied in a way that constitutes copyright infringement, please provide us with a written notice containing the following information:

1. Your name, address, telephone number, and email address (if any).
2. A description of the copyrighted work that you claim has been infringed.
3. A description of where on the Vimeo Site the material that you claim is infringing may be found, sufficient for VIMEO to locate the material (e.g., the URL).
4. A statement that you have a good faith belief that the use of the copyrighted work is not authorized by the copyright owner, its agent, or the law.
5. A statement by you UNDER PENALTY OF PERJURY that the information in your notice is accurate and that you are the copyright owner or authorized to act on the copyright owner's behalf.
6. Your electronic or physical signature.

You may submit this information via:

- Online: **Our DMCA claim form**
- Email: **dmca@vimeo.com**
- Offline: **VIMEO's Copyright Agent**

### **Filing a DMCA Counter-notification to Restore Removed Content—for Vimeo Users**

If you believe that your material has been removed by mistake or misidentification, please provide VIMEO with a written counter-notification containing the following information:

1. Your name, address, and telephone number.
2. A description of the material that was removed and the location on the Vimeo Site (e.g., the URL) where it previously appeared.
3. A statement UNDER PENALTY OF PERJURY that you have a good faith belief that the material was removed or disabled as a result of mistake or misidentification.

4. A statement that you consent to the jurisdiction of the Federal District Court for the judicial district in which your address is located, or if your address is outside of the United States, any judicial district in which VIMEO may be found (which includes the United States District Court for the Southern District of New York), and that you will accept service of process from the person who filed the original DMCA notice or an agent of that person.
5. Your electronic or physical signature.

You may submit this information via:

- Email: [dmca@vimeo.com](mailto:dmca@vimeo.com)
- Offline: **VIMEO's Copyright Agent**

Please note that we will send any complete counter-notifications we receive to the person who submitted the original DMCA notice. That person may elect to file a lawsuit against you for copyright infringement. If we do not receive notice that a lawsuit has been filed within ten (10) business days after we provide notice of your counter-notification, we will restore the removed materials. Until that time, your materials will remain removed.

### **Repeat Infringer Policy**

**VIMEO will terminate user accounts that have been the subject of three (3) separate DMCA notices.** In the event a user's materials are removed due to a DMCA notice and then subsequently restored due to the filing of a DMCA counter-notification, VIMEO will treat the underlying DMCA notice as withdrawn.

VIMEO reserves the right to terminate user accounts that are the subject of fewer than three (3) DMCA notices in appropriate circumstances, such as where the user has a history of violating or willfully disregarding Vimeo's Terms of Service.

### **Warning**

In filing a DMCA notice or counter-notification, please make sure that you have complied with all of the above requirements. If we request additional information necessary to make your DMCA notice or counter-notification complete, please provide that information promptly. If you fail to comply with all of these requirements, your DMCA notice or counter-notification may not be processed further.

In addition, please make sure that all of the information you provide is accurate. **UNDER SECTION 512(f) OF THE COPYRIGHT ACT, 17 U.S.C. § 512(f), ANY PERSON WHO KNOWINGLY MATERIALLY MISREPRESENTS THAT MATERIAL OR ACTIVITY IS INFRINGING OR WAS**

**REMOVED OR DISABLED BY MISTAKE OR MISIDENTIFICATION  
MAY BE SUBJECT TO LIABILITY.**

Vimeo may disclose any communications concerning DMCA notices or other intellectual property complaints with third parties, including the users who have posted the allegedly infringing material. If you have questions about the legal requirements of a DMCA notice, please contact an attorney or see Section 512(c)(3) of the U.S. Copyright Act, 17 U.S.C. § 512(c)(3), for more information. If you have questions about the legal requirements of a DMCA counter-notification, please contact an attorney or see Section 512(g)(3) of the U.S. Copyright Act, 17 U.S.C. § 512(g)(3), for more information.

**Vimeo's Copyright Agent**

You may send a DMCA notice, a DMCA counter-notification, or any inquiries concerning intellectual property to VIMEO's Copyright Agent:

***Vimeo, LLC***  
*555 West 18th Street*  
*New York, New York 10011*  
*Attn: Legal Dept. – Copyright Agent*  
**[dmca@vimeo.com](mailto:dmca@vimeo.com)**

Attached hereto as **Exhibit 4** is a true and correct copy of Vimeo's DMCA (Copyright) Notifications and Counter-Notifications Process page.

11. Vimeo makes the Copyright Page available on the Terms of Service, as well as through a clickable link (called "Copyright") in the footer of the Vimeo website.

12. Vimeo reiterates Vimeo's copyright policy through posts on the website and individual communications with users. For example, in response to questions posted in the Vimeo forum or made directly to Vimeo staff regarding the use of potentially copyrighted material, Vimeo employees generally use a pre-scripted message stating:

While we cannot opine specifically on the situation you are referring to, adding a third party's copyrighted content to a video generally (but not always) constitutes copyright infringement under applicable laws.

Under relevant U.S. laws, should a copyright owner come across their copyrighted content on one of our sites, they can submit a takedown notification

requesting that we remove the content. This same area of law affords the operator of the site some level of protection from claims of copyright infringement, when dealing with user-generated-content. The same protection does not apply to the actual poster of the content.

Again, we cannot provide any legal advice on this subject, so if you are genuinely concerned, we suggest you contact an attorney.

### **Enforcement of Vimeo's Terms of Service**

13. Vimeo's Terms of Service (which incorporate, *inter alia*, the Community Guidelines and the Copyright Page) do not request that users upload any particular content. Rather, they impose limitations on the content users may upload. For example, users are not permitted to, *inter alia*, upload videos with sexually explicit material, videos that incite hatred or include hate speech, defamatory or discriminatory speech, videos that depict unlawful acts or extreme violence, or videos that infringe any third party's copyrights or other rights.

14. Notwithstanding these prohibitions, users have the practical ability (but not legal right) to upload any video content to Vimeo (absent technological limitations or file size quotas). Vimeo does not prescreen user videos.

15. Vimeo takes steps to remove uploaded content that violates its Terms of Service. Vimeo has developed multiple computer programs, referred to internally as "Moderator Tools" or "Mod Tools," that assist Vimeo's Community team with locating and removing videos that, based upon Vimeo's experience, may contain content that violates Vimeo's Terms of Service. For example, Vimeo has developed a Mod Tool called "Sweet Spot," which identifies videos that are approximately as long as a typical half-hour or hour-long television program without advertisements. Another Mod Tool called "Gainers" identifies videos that have recently received a large number of views. Vimeo also enables its users to "flag" videos that they believe violates Vimeo's Terms of Service. Flagged videos appear in the "Flagged Videos" Mod Tool.



In addition, Vimeo staff review complaints submitted from users and non-users submitted via email and other means. Vimeo staff review videos that have been identified by the various Mod Tools or complaints to determine if they violate the Terms of Service. If the staff determine that a video has violated the Terms of Service, the staff will remove the video.

16. In the course of reviewing content as set forth above, Vimeo staff may also delete user accounts for various reasons, including repeatedly uploading videos that violate Vimeo's Terms of Service. In fact, Vimeo has terminated thousands of user accounts for uploading content in violation of the Terms of Service including posting content that appeared, in Vimeo staff's judgment, to consist of clips from movies, television, or other content not created by the uploader or for DMCA-related violations.

**Vimeo's Policy and Procedures for DMCA Compliance**

17. I have personally overseen Vimeo's DMCA compliance program since December 2009. Until the fall of 2010, Dalas Verdugo, Community Manager at Vimeo, assisted me with the implementation of this program. Since the fall of 2010, Christina Toth, Compliance Administrator at Vimeo, has performed this role. Ms. Toth is currently responsible for, among other things, reviewing all DMCA takedown notices, responding to DMCA notice-filers, removing videos where appropriate, and processing DMCA counter-notices.

18. From August 2006, when Vimeo was acquired by IAC, to approximately August 2008, Vimeo's DMCA compliance was overseen by Joshua Sussman, the primary attorney responsible for IAC's Programming group (which, at the time, included Connected Ventures, LLC and Vimeo), with the assistance of Jonathan Marcus, Vimeo's then-General Manager, and Mr. Verdugo. From approximately August 2008 until November 2009, Vimeo's DMCA compliance was overseen by Adam Agensky, the primary attorney responsible for IAC's with

Mindspark Interactive Network, Inc. subsidiary, with the assistance of Julie-Anne Selvey, another Mindspark attorney, and Mr. Verdugo

19. Vimeo has registered a designated agent to receive notifications of claimed infringement on file with the Copyright Office. Vimeo also posts its DMCA contact information on its website. DMCA complainants may send notices to Vimeo (1) by email (to [Michael.Cheah@iac.com](mailto:Michael.Cheah@iac.com) or [dmca@vimeo.com](mailto:dmca@vimeo.com)), (2) by U.S. mail or courier to 555 West 18th Street, New York, New York, 10011, (3) by fax (to 212-632-9547), and/or (4) through an online webform (publicly available at <http://vimeo.com/dmca/claim>). The latter form provides an online template containing the information required by 17 U.S.C. § 512(c)(3) that copyright holders, who are also registered Vimeo users, can fill out and submit to Vimeo. I cannot recall ever receiving a DMCA takedown notice at [Michael.Cheah@iac.com](mailto:Michael.Cheah@iac.com) without any prior communication between me and the copyright holder (or agent thereof). In addition to these methods, Vimeo will process any DMCA takedown notice (or any communication that appears to request the removal of a video for copyright-related reasons) that it receives in any manner, such as other Vimeo email addresses and even email addresses of Vimeo's affiliates.

20. Prior to August 9, 2010, the email contact information for Vimeo's designated agent was [dmca@vimeo.com](mailto:dmca@vimeo.com), and before that, [ricky@collegehumor.com](mailto:ricky@collegehumor.com). The owner of [ricky@collegehumor.com](mailto:ricky@collegehumor.com) is Ricky Van Veen, one of the founders of (and current employee of) Connected Ventures.<sup>2</sup> Attached hereto as **Exhibit 5** are true and correct copies of Vimeo's designations of its copyright agent on record with the Copyright Office.

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<sup>2</sup> Vimeo was started by employees of Connected Ventures, LLC and was, until July 2008, a division of Connected Ventures. In July 2008, Connected Ventures contributed the assets pertaining to Vimeo to Vimeo, LLC. Both Connected Ventures and Vimeo are subsidiaries of IAC. Mr. Van Veen remains a senior officer of Connected Ventures. In the past, if Mr. Van

21. Vimeo reviews and processes DMCA takedown notices expeditiously. Upon receiving a notice of alleged infringement pursuant to the DMCA, Vimeo will first review the notice to determine whether it substantially complies with 17 U.S.C. § 512(c)(3).

22. If the DMCA takedown notice does not substantially conform to the requirements of 17 U.S.C. § 512(c)(3), Vimeo notifies the complaining party of the specific missing elements and requests that information.

23. If the DMCA takedown notice does comply with 17 U.S.C. § 512(c)(3), Vimeo will review the video to make sure that it matches the description in the notice. If the video matches the description, Vimeo will expeditiously remove or disable access to the video. DMCA-compliant takedown notices are routinely processed within one or two business days, and often the same day if received on a business day during regular hours. However, DMCA takedown notices that list many allegedly infringing URLs can take longer to process.

24. Videos identified in DMCA takedown notices are removed from the public-facing website and placed in Vimeo's "Purgatory" database, which may only be accessed by Vimeo employees with "Moderator" status. Purgatory keeps a permanent record of all videos removed from Vimeo as a result of DMCA takedown notices.

25. After removing a video pursuant to a DMCA takedown notice, Vimeo notifies the complaining party that the video has been removed via an email message stating the following:

We are writing in response to the Digital Millennium Copyright Act ("DMCA") takedown notice that you provided to us (the "Notice"). Please note that, as of the date hereof, Vimeo, LLC has:

- Removed or disabled access to the material on Vimeo that you identified in the Notice;

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Veen received a DMCA takedown notice, he would forward the notice to the persons at Vimeo responsible for DMCA compliance, who would then handle Vimeo's response.

- Where such material formerly appeared on Vimeo, posted a statement that Vimeo has removed such material as a result of a third-party notification claiming that such material is infringing; and
- Notified the persons that posted the material in question that Vimeo has removed or disabled access to such material as a result of a third-party notification claiming that such material is infringing.

This letter, and the actions taken as described herein, do not and shall not constitute or be construed as an admission of liability or wrongdoing whatsoever on our part, including any infringement (direct, contributory or vicarious) by us of any intellectual property or other rights, and do not constitute and shall not be deemed to constitute any waiver, release or impairment of any kind of any of our rights available to us at law or in equity, all of which are hereby expressly reserved.

Furthermore, this letter, and the actions taken as described herein do not constitute, and shall not be construed as, an agreement or course of dealing by us to in the future take any action or refrain from taking any action.

We trust that this concludes this matter.

26. Vimeo also notifies the user who posted the video via email that the video was removed pursuant to a DMCA takedown notice. Vimeo informs the user that:

This is to notify you that, as a result of a third-party notification by [Complaining Party Name] claiming that the material is infringing, we have removed or disabled access to the material that appeared at [URL of video].

If you believe that your material has been removed or disabled by mistake or misidentification, please provide VIMEO's Copyright Agent with a written counter-notification containing at least the following information (please confirm these requirements with your legal counsel or see Section 512(g)(3) of the U.S. Copyright Act, 17 U.S.C. 512(g)(3), for more information):

- a physical or electronic signature (an electronic signature may be signified by writing your first and last name or initials between two forward slashes, e.g., \"/FIRST LAST/");
- identification of the material that has been removed or to which access has been disabled and the location at which the material appeared before it was removed or access to it was disabled;

- a statement made under penalty of perjury that you have a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled; and
- your name, address, telephone number, and a statement that you consent to the jurisdiction of the Federal District Court for the judicial district in which your address is located, or if your address is outside of the United States, for any judicial district in which the service provider (Vimeo, LLC) may be found, and that you will accept service of process from the person who provided the original takedown notification or an agent of such person.

You acknowledge that if you fail to comply with all of the aforementioned notice requirements, your counter-notification may not be valid and that VIMEO may ignore such incomplete or inaccurate notices without liability of any kind.

Upon receipt of a properly completed counter-notification, VIMEO will forward a copy to the party who submitted the original claim of copyright infringement and/or such party's legal counsel. Please note that when we send the counter-notification, it will include your personal information. By submitting a counter-notification, you consent to such disclosure. Within ten days, VIMEO may receive notice that the original claimant has filed a court action regarding this matter. If such notice is received, VIMEO will be unable to restore your material. If no notice is received, VIMEO will endeavor to restore your material between 10 and 14 days following receipt of your counter-notification.

Under Section 512(f) of the Copyright Act, 17 U.S.C. 512(f), any person who knowingly materially misrepresents that material or activity is infringing or was removed or disabled by mistake or misidentification may be subject to liability.

DISCLAIMER: THE INFORMATION PROVIDED ABOVE SHOULD NOT BE CONSTRUED AS LEGAL ADVICE. VIMEO PROVIDES THIS INFORMATION FOR INFORMATIONAL PURPOSES ONLY, AND RECOMMENDS YOU SEEK INDEPENDENT LEGAL COUNSEL.

27. When a video is removed pursuant to a DMCA takedown notice, a notification page is placed on the URL where the video previously appeared, publicly informing visitors:

Sorry, "[title of video]" was deleted at [time] [date]. Vimeo has removed or disabled access to the following material as a result of a third-party notification by [DMCA complainant] claiming that this material is infringing: [title of video].

Attached hereto as **Exhibit 6** are true and correct copies of printouts from Vimeo reflecting this public-facing notification.

28. After Vimeo notifies the DMCA complainant of the removal, it considers the matter to be closed unless it receives a counter-notification from the uploader of the video or a message from the original complainant withdrawing the DMCA takedown notice.

29. Pursuant to 17 U.S.C. § 512(g)(2), Vimeo notifies the original complainant of any counter-notification received as a result of a DMCA takedown notice. If the original complainant notifies Vimeo within ten business days that it has filed a lawsuit against the uploader, the video will remain disabled. Otherwise, Vimeo may restore access to the video. Attached hereto as **Exhibit 7** are true and correct copies of examples of counter-notifications submitted to Vimeo.

30. Based upon documents I have reviewed and discussions with prior counsel and employees for Defendants, I understand that in its early years, Vimeo received very few DMCA takedown notices—on average approximately zero to five per month, and by mid-2008, as Vimeo grew, it received on average approximately zero to five DMCA takedown notices per week, although the number fluctuated from week to week.

31. Vimeo has received approximately zero to ten DMCA takedown notices per business day during the time I have supervised Vimeo's DMCA.

32. Between October 2008 (when Vimeo's purgatory database was formally implemented) and November 2010, Vimeo has deleted at least 4,000 videos as a result of DMCA takedown notices.

#### **Vimeo's Repeat Infringer Policy**

33. Vimeo has a policy that provides for the termination of users who are deemed to be repeat infringers. This repeat infringement policy is detailed on Vimeo's Copyright Page, quoted above.

34. In implementing this policy, Vimeo uses a “three strikes” rule: A user’s account will be terminated if the user has been the subject of three separate, valid DMCA takedown notices. For the purpose of this rule, DMCA takedown notices filed within three business days of each other are treated as a single notice, and multiple videos removed in response to a single DMCA takedown notice are considered to be a single “strike.” Vimeo implemented this rule to give users an opportunity correct their behavior after they learn why they should not have uploaded a particular video.

35. In the course of processing a valid DMCA takedown notice, Vimeo will review the affected user’s “Rap Sheet,” which is an internal Vimeo page that displays the user’s account information, videos, activities, and the number of videos previously removed (if any) in response to DMCA takedown notices. If there are at least three videos removed for DMCA reasons, Vimeo will review them to determine how many “strikes” the user is deemed to have received based upon the rules above. If the user has accumulated three “strikes,” Vimeo will terminate the account.

36. Any video that is removed pursuant to a valid DMCA takedown notice is placed on Vimeo’s “blocked video” list, which prevents *any* Vimeo user from re-uploading that exact same video file.

37. If a user files a valid DMCA counter-notification and the video at issue is ultimately restored to the Vimeo website, the video will be removed from the Purgatory database and therefore will not count as a “strike” for the purposes of the repeat infringer policy.

38. The user e-mail addresses associated with terminated accounts are added to the list of e-mail addresses that have been banned from Vimeo, thus preventing the user from reopening an account with the same e-mail address.

39. In reviewing a valid DMCA takedown notice, Vimeo also reviews the other videos in the account to see if the user has violated Vimeo's Terms of Service (*e.g.*, by uploading videos that they did not make). If so, Vimeo may, and often does, terminate the account, regardless of the number of "strikes" the account has received.

40. Based upon documents I have reviewed and discussions with prior counsel and employees for Defendants, I understand that, prior to the installation of the Purgatory database in 2008, user accounts were often terminated upon the receipt of the first DMCA takedown notice, and that Vimeo's DMCA processing team would identify repeat infringers by reviewing DMCA email records or recalling the name of a user implicated in a prior DMCA takedown notice.

41. Vimeo has terminated user accounts as repeat infringers under its DMCA policy, as well as for uploading videos that the user did not create (such as movies, TV trailers and other similar content).

42. Vimeo does not actively prevent copyright owners from collecting information needed to issue a DMCA takedown notice.

### **Music on Vimeo**

43. Vimeo treats copyrighted music in the same manner that it treats all other copyrighted content. As set forth in its Terms of Service, Vimeo requires that users have the necessary licenses, rights, consents, and/or permissions to use any posted content, including music, and removes content with infringing music in response to valid DMCA takedown notices. Vimeo routinely removes videos with infringing music in response to DMCA takedown notices.

44. As a practical matter, it is often difficult for Vimeo to ascertain whether a user who uploaded a video has the rights to all of the content in the video, including the music. For



example, Vimeo routinely receives counter-notifications pursuant to the DMCA stating that the user has the necessary rights to upload the video.

45. It can also be difficult to determine whether the use of music in a video would be considered a *de minimis* or fair use such that it would not require permission of the rights holders in order to be lawfully uploaded to Vimeo. This is especially true for videos where music is used together with original, non-commercial video content. In fact, the Recording Industry of America, Inc. (“RIAA”), which frequently submits DMCA takedown notices, previously recognized this difficulty when it withdrew DMCA takedown requests sent to Vimeo in April 2006. Attached hereto as **Exhibit 8** is a true and correct copy of this email chain between Vimeo and RIAA.

#### **Plaintiffs’ DMCA Takedown Notices and Complaints**

46. Prior and subsequent to the filing of the Complaints in this action, Vimeo had received, and responded to, requests from EMI Music North America (“EMI Music”) to remove videos from Vimeo. On December 11, 2008, Vimeo received a letter from EMI Music alleging that approximately 170 videos on Vimeo infringed EMI Music’s copyrights in sound recordings and/or musical compositions. Vimeo removed the more than 170 videos referenced therein within approximately 3.5 weeks after receiving the letter. Attached hereto as **Exhibit 9** are true and correct copies of EMI Music’s letter to Vimeo and subsequent correspondence confirming the removal of the purportedly infringing videos.

47. Plaintiffs filed two complaints (the “Complaints”) on December 10, 2009, and served Vimeo with the Complaints on or about December 14, 2009. The Complaints included schedules collectively identifying 199 purportedly infringing sound recordings and musical compositions for which Plaintiffs purported to own the copyrights. Despite the fact that these

schedules did not substantially comply with 17 U.S.C. § 512(c)(3), Vimeo removed the videos at the URLs referenced therein within two weeks of receiving the Complaints. Prior to filing the Complaints, Plaintiffs never sent Vimeo a DMCA takedown notice identifying the URLs listed in the schedules of the Complaints.

48. I subsequently learned that one of the videos listed in one of the schedules attached to the Complaints had been restored to the website without Vimeo's knowledge or consent. I investigated the issue and learned that a former Vimeo community assistant who, through an internal oversight still had "Moderator" status on Vimeo, used her access to the website to restore her video. As soon as I became aware of this situation the video was removed and the former employee's Moderator status was revoked.

49. On June 15, 2010, Vimeo received by email six DMCA takedown notices from EMI Music and its affiliates advising that they believed certain videos on Vimeo infringed their copyrights. Vimeo removed the videos referenced therein the very same day and Vimeo informed EMI Music that the videos had been removed. Attached hereto as **Exhibit 10** is a true and correct copy of the correspondence reflecting the DMCA takedown notices and removal of the videos.


50. On May 9, 2012, Vimeo received proposed amendments to the schedules to the Complaints seeking to add over 1,000 additional allegedly infringing videos. Despite the fact that these schedules did not substantially comply with 17 U.S.C. § 512(c)(3), Vimeo removed the videos referenced therein in less than 48 hours. Attached hereto as **Exhibit 11** is a true and correct copy of a letter I sent to Plaintiffs confirming the removal of these videos.

51. Vimeo has received at least three valid DMCA counter-notifications for videos it removed based upon the May 9, 2012 schedules. The users filing these counter-notifications stated under the penalty of perjury that they were the directors, writers and/or editors of the music videos at issue. By communications dated May 11, 2012 and May 15, 2012, I provided counsel for Plaintiffs notice of these counter-notices and attached the counter-notifications thereto. Plaintiffs did not notify Vimeo that they had filed a lawsuit within 10 business days of receipt of the counter-notifications, and as a result, two of the videos were restored to the site. One counter-notificant withdrew its counter-notification. Attached hereto as **Exhibit 12** are true and correct copies of the correspondence reflecting these counter-notifications.

52. On July 11, 2012, Vimeo received by email a DMCA takedown notice from EMI Music and its affiliates advising that they believed a certain video on Vimeo infringed their copyrights. Vimeo expeditiously removed the video referenced therein the very same day and informed EMI Music of same. Attached hereto as **Exhibit 13** is a true and correct copy of the correspondence reflecting the DMCA takedown notices and removal of the video.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

DATED: September 7, 2012  
New York, New York

  
Michael A. Cheah